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CIVIL DOCKET

UNITED STATES DISTRICT COURT

| Title of Case | Attorneys |
| --- | --- |
| JAMES CHAFFIN<br>—vs—<br>LEROY STYNCHCOMBE,<br>SHERIFF OF FULTON COUNTY | For plaintiff:<br>Glenn Zell<br>Suite 822<br>15 Peachtree St., N.E.<br>Atlanta, Georgia 30303<br>(524-6878)<br><br>For defendant:<br>Lewis R. Slaton, District Atty.<br>Tony H. Hight, Asst. Dist. Atty.<br>Joel M. Feldman, Asst. Dist. Atty.<br>Third Floor<br>Fulton County Courthouse<br>Atlanta, Georgia 30303 |

| Statistical Record | Costs | Date | Name or Receipt No. | Rec. | Disb. |
| --- | --- | --- | --- | --- | --- |
| J.S. 5 3-23-71<br>J.S. 6 4-20-71<br>Basis of Action:<br>Pet. for Writ. of H.C.—seeks to set aside State sentence.<br>Action arose at: | Clerk<br>Marshal<br>Docket fee<br><br>Witness fees<br>Depositions | FORMA PAUPERIS | | | |

| Date 1971 | Proceedings | |
|---|---|---|
| Mar. 23 | Order allowing petition for writ of habeas corpus filed in forma pauperis and directing parties to file briefs and arguments within 20 days, filed. | |
| | Petition for Writ of Habeas Corpus with Motion to proceed in forma pauperis and affidavit and one attachment, filed. | |
| | (copy of order to Counsel for Petr., copy of pet. and order to Resp.) | jfe |
| Mar. 22 | Petitioners petition to be present at hearing, filed. To SOS w/file. | pwm |
| Mar. 30 | Brief of petitioner, filed. To SOS. | mjw |
| Apr. 1 | Order filed denying petitioner's petition to be present at hearing. Copy to petitioner, petitioner's counsel & respondent. | " |
| Apr. 9 | Petr's. letters dated 4/4/71 & 4/6/71 to SOS w/file. | jwe |
| Apr. 12 | brief in behalf of respondent, filed. To SOS. | pwm |
| Apr. 14 | SUBMITTED ON PETITION FOR WRIT OF HABEAS CORPUS. | " |
| Apr. 16 | Petr's. supplement to petition (in letter form), filed. To SOS. (copy to resp.) | jwe |
| Apr. 20 | ORDER denying the petition for writ of habeas corpus, filed. | |
| | JUDGMENT filed and entered in favor of the respondent and against the petitioner. (Cpy. of order & judgment to counsel) | pwm |

| | | | |
|---|---|---|---|
| Apr. | 28 | Order to petr's. supplement to petition, filed. Copy to parties. | jwe |
| | | Petr's. notice of appeal from the order of 4/20/71, filed. | " |
| | | Petr's. application for certificate of probable cause for appeal and motion to proceed in forma pauperis, and ORDER allowing petr. to appeal in forma pauperis & issuing a Certificate of Probable Cause, filed. (Copy of notice, application & order to respondent & U. S. Court of Appeals). | " |
| May | 11 | Letter of inquiry from Petr., Rec'd. To SOS with file. | jfe |
| May | 18 | Letter from Petr. seeking copy of opinion, Rec'd. Answered by SOS 5-20-71. | jfe |
| Jun. | 1 | Letter from Petr. seeking advise, Rec'd. Answered by SOS 5-28-71. | jfe |
| Jun. | 2 | RECORD ON APPEAL MAILED TO USCA. (Ack) | ple |
| Jun. | 11 | Letter from Petr. seeking assistance in filing appendix in U.S.C.A. filed. | jfe |
| Jun. | 30 | ORDER trating petition for writ of habeas corpus as an amendment to this action and denying same and directing the Clerk to supplement the record now on appeal with this order and also the amended petition and also a letter from petr. seeking to file an appendix to the record on appeal, filed. Copy to Petr. & D.A. of Fulton County. | |
| | | Amended petition for Writ of habeas corpus, filed. | jfe |

ATTEST: A TRUE COPY
CERTIFIED THIS JUN. 30, 1971
Claude L. Goza, Clerk
By: James F. Edmondson, Jr., Deputy Clerk

[Filed in Clerk's Office Mar. 23, 1971]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES CHAFFIN, PETITIONER
v.
LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY, RESPONDENT
Case No. 14890

PETITION FOR WRIT OF HABEAS CORPUS

1.

Petitioner is illegally imprisoned and restrained of his liberty by respondent Leroy Stynchcombe, Sheriff of Fulton County, Fulton County, Georgia.

2.

The cause of the imprisonment is that petitioner was retired for the offense of robbery and received a sentence of life imprisonment and the jury was qualified for the death penalty and the trial judge did charge on the law of capital punishment.

3.

That petitioner had received a fifteen year sentence in the first trial, the conviction was affirmed in *Chaffin v. State*, 225 Ga 602, but this Court granted his writ of habeas corpus in *Chaffin v. Stynchcombe*, case no. 13340, Dec. 18, 1969, Judge Sidney Smith.

4.

That petitioner has been in custody ever since his arrest in 1968 on said charges and there is nothing to justify increasing his sentence. *Pearce v. North Carolina*, 395 U.S. 711; See Justice Douglas concurring opinion page 733 and 734, footnote 4 on a review of state cases on increased

sentence; See also *Patton v. North Carolina,* 381 F 2d 636 (4th Circuit).

5.

That to increase his sentence violates petitioner's fourteenth amendment rights of equal protection and due process of law of the United States Constitution; that to increase his sentence without any legitimate reason penalizes petitioner for appealing his first conviction and thereby denies or feters and chills his right of appeal which is a valuable constitutional right. See *Griffin v. Illinois,* 351 U.S. 12; *Douglas v. California,* 372 U.S. 353.

6.

That if a defendant can receive an increase in sentence on re-trial he would be forced to either plead guilty in his second trial or waive his right to a jury trial so that the trial judge would be limited to the sentence given in his first trial, thereby violating petitioner's sixth and fourteenth amendment constitutional rights of the United States Constitution to trial by jury. See *U.S. v. Jackson,* 390 U.S. 570.

7.

That the entire re-trial is void and illegal since the jury was qualified on the death sentence and several jurors were excluded and the State argued the death penalty and the trial judge charged on the law of capital punishment to the jury.

8.

Petitioner denies his guilt and has exhausted his state remedies by appealing to the Georgia Supreme Court (see attached opinion, no. 26214, March 4, 1971.)

9.

Petitioner attached his affidavit and asks that he be permitted to file in forma pauperis as he is indigent

WHEREFORE, petitioner prays that a writ of habeas corpus issue out of this court to Leroy Stynchcombe, Sheriff of Fulton County, respondent, commanding him to bring peti-

tioner before this court at a specific time and place and to answer to the petition and to show cause why petitioner should not be restored to his liberty and he be allowed to file in forma pauperis.

b) That a hearing be held to examine all the records and proceedings in this case and to inquire into the cause of petitioner's detention;

c) That petitioner be restored to his liberty;

d) That petitioner be granted such other and further relief as the Court may deem proper and just.

Respectfully submitted,

/s/ Glenn Zell
GLENN ZELL
*Attorney for Petitioner*

Suite 822
15 Peachtree St., N.E.
Atlanta, Georgia
524-6878

[Filed in Clerk's Office Mar. 23, 1971]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES CHAFFIN

vs.

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY

Civil Action Number 14890

This is a petition for a writ of habeas corpus filed by a state prisoner. Petitioner was originally tried and convicted of the offense of robbery by open force and violence, and sentenced to fifteen years imprisonment. The conviction was affirmed. Chaffin v. State, 225 Ga. 602 (1969). This Court granted the prisoner's petition for a writ of habeas corpus. Upon re-trial, he was again convicted, but this time was sentenced to life imprisonment, the length of sentence apparently being set by the jury as prescribed by Georgia law. Again the conviction was affirmed. Chaffin v. The State, —— Ga. ——, (No. 26214, March 4, 1971).

The petitioner has filed this petition, claiming that the re-trial was void and illegal and the present sentence unlawful, because the jury was qualified on the death sentence, the state argued the death penalty, the trial judge charged on the law of capital punishment, and petitioner received a harsher sentence on re-trial, without justification, in violation of the constitutional principles enunciated in North Carolina v. Pearce, 395 U.S. 711 (1969); *see also* Moon v. Maryland, 398 U.S. 319 (1970).

Petitioner having raised this point in a motion for new trial (at the end of the re-trial) and on (his most recent) appeal, it appears that he has exhausted his state remedies. *See* Young v. Alabama, 427 F. 2d 176 (5th Cir. 1970); Williams v. Wainwright, 410 F. 2d 144 (5th Cir. 1969); Hill v. Beto, 390 F. 2d 640 (5th Cir. 1968).

In the Court's view, the holdings in *Pearce* are clearly to the effect that a defendant on re-trial may receive a harsher sentence without violation of his substantive constitutional

rights. However, due process protects the defendant against vindictiveness in the second sentence and imposition of such sentence must be on objective grounds. Where under the Georgia procedure, as here, each sentence is imposed by a separate jury (rather than the Court) on presumably objective information, there does not appear to be room for any vindictiveness on the interplay of the due process principle of *Pearce*. However, the matter is deemed of sufficient importance to allow briefs by both parties.

Accordingly, each party shall, within twenty days of the date this order is filed, file such briefs and argument as are desired. It is requested that the parties address themselves in particular to the issues raised by the fact that in Georgia, the jury sets sentence, insofar as that practice is a factor in the instant case.

Let the same be filed in forma pauperis.

IT IS SO ORDERED.

This the 22nd day of March, 1971.

/s/ Sidney O. Smith, Jr.
SIDNEY O. SMITH, JR.
*United States District Judge*

[Filed in Clerk's Office Apr. 12, 1971]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES CHAFFIN

v.

LEROY STYNCHCOMBE,
SHERIFF OF FULTON COUNTY

Case No. 14890

BRIEF IN BEHALF OF RESPONDENT

In the Georgia Supreme Court, the court held:

> "A careful reading of the opinion of the Supreme Court in that case (North Carolina v. Pearce) reveals that the court answered . . . that imposition of a more severe sentence upon retrial does not violate the equal protection clause of the Fourteenth Amendment in the instant case."
> *Chaffin v. State,* Supreme Court of Georgia, No. 26219.

In *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, the Supreme Court of the United States held, "Neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction." But to prevent a "retaliatory motivation" in the resentencing in violation of the Due Process Clause of the Fourteenth Amendment the court stated, "when ever a *judge* imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."

While the court made clear in *Pearce* that "Due Process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial," no procedure could afford the defendant the protection of due process in resentencing better than an impartial jury that was unaware of what sentence had been previously imposed. The jury could not be charged with any retaliatory motivation lacking that knowledge. An

rights. However, due process protects the defendant against vindictiveness in the second sentence and imposition of such sentence must be on objective grounds. Where under the Georgia procedure, as here, each sentence is imposed by a separate jury (rather than the Court) on presumably objective information, there does not appear to be room for any vindictiveness on the interplay of the due process principle of *Pearce*. However, the matter is deemed of sufficient importance to allow briefs by both parties.

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Let the same be filed in forma pauperis.

IT IS SO ORDERED.

This the 22nd day of March, 1971.

/s/ Sidney O. Smith, Jr.
SIDNEY O. SMITH, JR.
*United States District Judge*

[Filed in Clerk's Office Apr. 12, 1971]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES CHAFFIN

v.

LEROY STYNCHCOMBE,
SHERIFF OF FULTON COUNTY

Case No. 14890

BRIEF IN BEHALF OF RESPONDENT

In the Georgia Supreme Court, the court held:

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While the court made clear in *Pearce* that "Due Process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial," no procedure could afford the defendant the protection of due process in resentencing better than an impartial jury that was unaware of what sentence had been previously imposed. The jury could not be charged with any retaliatory motivation lacking that knowledge. An

impartial jury selected to pass upon the issues the first time uniquely fulfills the impartiality element required in due process. *Salisbury v. Grimes,* 223 Ga. 776 (2).

In *Salisbury v. Grimes,* Fifth Circuit, No. 26179, January 14, 1969, a decision involving also a jury question which was later recalled, the Fifth Circuit held, in part:

> "In our view, it would be wholly incongruous and without constitutional foundation to hold that a state is forever bound by and may not increase a jury imposed sentence . . ."

Similarly, a check shows that the majority of the states hold that a jury may increase sentence upon retrial. See *State v. Miller,* 231 So. 2nd 260 (1970, Florida); *Gibson v. The State,* 448 S.W. 2d 481 (Texas); *State v. Sparrow,* 173 S.E. 2d 902 (North Carolina); *Pinkard v. Henderson,* 452 S.W. 2d 908 (Tenn.); *Britt v. The State,* 455 S.W. 2d 625 (Tenn.).

Respectfully submitted,

/s/ Lewis R. Slaton
LEWIS R. SLATON
*District Attorney*
*Atlanta Judicial Circuit*

/s/ Tony H. Hight
TONY H. HIGHT
*Assistant District Attorney*
*Atlanta Judicial Circuit*

/s/ Joel M. Feldman
JOEL M. FELDMAN
*Assistant District Attorney*
*Atlanta Judicial Circuit*

Third Floor
Fulton County Courthouse
Atlanta, Georgia 30303

[Filed in Clerk's Office Apr. 20, 1971]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | |
|---|---|
| JAMES CHAFFIN<br>vs.<br>LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY | Civil Action Number 14890 |

This is a petition for a writ of habeas corpus brought by a Georgia prisoner originally convicted of robbery by open force and violence, and sentenced to fifteen years imprisonment. This Court granted petitioner's first petition for a writ of habeas corpus. Upon re-trial, petitioner was again convicted of the same offense, but this time received a sentence of life imprisonment. The sole issue is whether the harsher sentence on re-trial violates the constitutional principles enunciated in *North Carolina v. Pearce,* 395 U.S. 711 (1969), where the length of each sentence was set by a different jury under applicable state law.

The relevant holding in *Pearce* is that while neither the double jeopardy provision nor the Equal Protection Clause of the United States Constitution impose an absolute bar to a harsher sentence upon reconviction, vindictiveness against a defendant for having successfully attacked his first conviction on appeal or in post-conviction proceedings must not affect the new sentence; and since mere fear of such vindictiveness might unconstitutionally deter a defendant from appealing or seeking post-conviction relief from his original conviction, due process requires that he be free of any such fear or apprehension, 395 U.S. at 723-725.

> In order to assure the absence of [vindictiveness], we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based on objective information concerning identifiable conduct on the part

> of the defendant occurring after the time of the original proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. (395 U.S. at 726).

*Pearce* does not, as petitioner argues, require that a prisoner deciding whether to attack his allegedly flawed conviction be absolutely free of the possibility of gaining only a Pyrrhic victory—a flawless new trial but a harsher new sentence. That the prisoner is entitled to such a guarantee of limited punishment was the argument which Justices Douglas and Marshall advanced in their separate opinion, 395 U.S. 726-737, and Justice Harlan stated in his, 395 U.S. at 744-751. But their view was not that of the majority.

The thrust of *Pearce* is that a prisoner deciding whether to attack an initial conviction is entitled to be free from the fear that he will receive a harsher sentence if re-convicted, solely because he chose to challenge the quality of justice he originally received. Ordinarily, where the length of each sentence is set by a different jury, there is no reason for such fear, and the strictures of *Pearce* do not apply. *Britt v. Tollett,* 315 F. Supp. 401 (E.D. Tenn. 1970); *contra Pinkard v. Neil,* 311 F. Supp. 711 (M.D. Tenn. 1970).

Assuredly, it is conceivable that circumstance could be shown indicating that a jury which imposed a harsher sentence upon a defendant's re-conviction was motivated by the vindictiveness described in *Pearce.* But where the sentences are set by different juries, the second ordinarily unaware of the action of the first, there is normally no likelihood that the new sentence will be affected by the motivation to penalize the defendant for exercising his rights to appeal or pursue post-conviction remedies. Therefore, there is no need for applying the restrictions set in Pearce to a new trial in which the jury will set the length of the sentence.

The present record contains no allegation or suggestion that the jury which set the life sentence was in fact moved by a desire to penalize the petitioner for having his first

conviction set aside. Therefore, there is no reason to reach the legal issues, if any, raised by such a showing.

Accordingly, the petition for a writ of habeas corpus is denied.

IT IS SO ORDERED.

This the 19th day of April, 1971.

/s/ Sidney O. Smith, Jr.
SIDNEY O. SMITH, JR.
*United States District Judge*

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES CHAFFIN,
PETITIONER-APPELLANT,

VS.

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY,
RESPONDENT-APPELLEE.

No. 71-2016

*Appeal from the United States District Court for the Northern District of Georgia*

(February 8, 1972)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

GEWIN, Circuit Judge: This case brings into focus obliquely the importance and weight to be accorded (a) conceptual abstractions as to crime and punishment, (b) principles which should govern the sound administration of justice in criminal cases, and (c) the societal interest in dealing fairly and effectively with those whose guilt is clearly established after being afforded a second trial following an appeal or postconviction proceeding in which a new trial was sought and granted.[1] We do not discuss these concepts separately or in detail. They underlie our consideration of the case at hand.

James Chaffin was convicted of the offense of robbery by open force and violence in a Georgia state court. In accordance with Georgia law[2] the jury fixed the punish-

[1] See United States v. Tateo, 377 U.S. 463, 12 L.Ed.2d 448 (1964); North Carolina v. Pearce, 395 U.S. 711, 721 n. 18, 23 L.Ed.2d 657, 667 n. 18 (1969).

[2] Ga. Code Ann. § 26-2502:

> Robbery by open force or violence shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprisonment in the penitentiary for life: Provided, however, the jury in all cases may recommend that the defendant be imprisoned in the penitentiary for not less than four years nor longer than 20 years, in the discretion of the court.

ment at 15 years imprisonment. His conviction was affirmed by the Georgia Supreme Court.[3] Thereafter he applied to the United States District Court for a writ of habeas corpus. The district court granted relief and ordered that Chaffin be retried. Upon retrial the jury again found him guilty and recommended mercy. Georgia law mandates that punishment under such a verdict shall be life imprisonment[4] and Chaffin was so sentenced. The Georgia Supreme Court again affirmed his conviction.[5] The record and the assertions of counsel for both parties during oral argument and in their briefs clearly indicate that the second trial was conducted by a different judge, before an entirely new jury, and with a different defense lawyer. A new defense was interposed and additional witnesses were called by both the state and the defense.

After his second trial Chaffin filed a petition for the writ of habeas corpus which was denied by the United States District Court. It is from the district court's order denying relief that Chaffin appeals. The sole issue[6] presented on this appeal is whether the harsher sentence imposed by the jury on retrial violates constitutional principles. We hold that it does not and affirm.

Chaffin urgently contends that an increased sentence constitutes a per se violation of the double jeopardy provisions of the fifth amendment and the equal protection

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[3] Chaffin v. State, 225 Ga. 602, 170 S.E.2d 426 (1969).

[4] See note 2 *supra*.

[5] Chaffin v. State, 225 Ga. 180 S.E.2d 741 (1971).

[6] After oral argument Chaffin, acting pro se, filed several letters with this court apparently seeking to raise a claim of ineffective assistance of counsel. The claim was not presented to the district court and there is nothing in the record to indicate that the state courts have been given the opportunity to consider it.

In addition to the brief filed by his appointed counsel, Chaffin filed a "supplemental brief" which he prepared himself. In his brief Chaffin contends that his original conviction was on a charge of "robbery by hands" and not robbery by force. If this were so the issue would be raised of a conviction upon retrial of an offense greater than that for which he was originally tried. Neither of the preceding contentions were presented either to the district or to the state courts. We therefore do not consider these matters on this appeal. Watkins v. Wilson, 408 F.2d 351 (9th Cir. 1969); *see*, Dryden v. United States, 403 F.2d 1009 (5th Cir. 1968). *See also* Jones v. Vineyard, 438 F.2d 1231 (5th Cir. 1971).

and due process clauses of the fourteenth amendment.[7] We begin by noting that the United States Supreme Court over 50 years ago in *Stroud* v. *United States*[8] held there was no per se constitutional prohibition against imposing an increased sentence upon retrial.

More recently in *North Carolina* v. *Pearce*[9] the Court explicitly rejected double jeopardy and equal protection principles as grounds for precluding a harsher sentence upon retrial.[10] The Court did, however, recognize a narrow circumstance in which due process may bar an increase in

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[7] Chaffin also suggests that if a jury is permitted to increase the sentence on a retrial a defendant would be forced either to waive a jury trial in the second trial or to plead guilty so that the trial judge could not increase the sentence. He claims this to be a violation of his sixth amendment right to a jury trial. There is no merit to this claim. The jury might decrease his sentence and the trial judge, giving full consideration to the principles set forth in North Caroline v. Pearce, 395 U.S. 711, 23 L.Ed.2d 656 (1969), might increase it. Furthermore, in Brady v. United States, 397 U.S. 742, 25 L.Ed.2d 747 (1970), the Supreme Court rejected what we consider to be a substantially similar argument. In *Brady* it was argued that the threat of a more severe punishment if the defendant chose to be tried by a jury coerced him to plead guilty in violation of the Fifth Amendment. The Court held that to be a constitutionally permissible dilemma.

[8] 251 U.S. 15, 64 L.Ed. 103 (1919).

[9] 395 U.S. 711, 23 L.Ed.2d 656 (1969). The Court's most recent decision on the question of increased sentences is of no assistance in the case sub judice. In North Carolina v. Rice, —— U.S. ——, 30 L.Ed.2d —— (1971) [No. 70-77, Dec. 14, 1971] the Court had before it the question whether *Pearce* applied to an increased sentence imposed upon a trial de novo in a North Carolina Superior Court after an intial trial in a lower court. The Fourth Circuit held that *Pearce* was applicable since it required that reasons be given if a sentence is increased and in *Rice* the record revealed nothing which warranted an increased sentence. Although the defendant had been discharged from prison before the case reached the court of appeals, the Fourth Circuit rejected the state's claim of mootness since according to the court there were certain rights and privileges to be regained by having a conviction expunged. The Supreme Court refused to decide the case on the merits. The Court pointed out that Pearce requires only resentencing and did not *ipso facto* require that the conviction be set aside. Thus, since there was no evidence whether Rice would reap any benefits merely from a reduction in a sentence already served, the Court vacated the judgment of the court of appeals and remanded the case to that court for reconsideration of the question of mootness.

[10] We hold, therefore that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction.

395 U.S., at 723, 23 L.Ed.2d at 668.

sentence. In *Pearce* upon retrial following an appeal the trial judge had increased the sentence which he had imposed after the first trial. The Supreme Court found no reasons or justifications in the record for the increased sentence. In such a case the Court said there is a possibility of vindictiveness on the part of the sentencing judge, and that such vindictiveness might "unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction." [11] The Court held that due process requires that a defendant be freed of the apprehension of a retaliatory motive on the part of the trial judge. To ensure due process the Court established the requirement that "whenever a *judge* imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." [12] As a further requirement the Court added that the reasons must be based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time time of the original proceeding." [13]

The Court was concerned with the elimination of the possibility of vindictiveness as a threat to a defendant weighing the merits and the advisability of seeking post conviction relief. There was no denunciation of increased sentences as such. *Moon* v. *Maryland*,[14] where the writ of certiorari was dismissed as being improvidently granted, strengthens this interpretation of *Pearce*. In *Moon* the Court granted the writ to consider the retroactivity of *Pearce*. Subsequently, the sentencing judge in the second trial filed an affidavit setting forth valid reasons for the increased sentence. But more importantly the Court found conclusively that vindictiveness played no part in the imposition of an increased sentence. In dismissing the writ, the Court said:

> But the dispositive development is that counsel for the petitioner has now made clear that there is no claim

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[11] *Id.* at 725, 23 L.Ed.2d at 669.

[12] *Id.* at 726, 23 L.Ed.2d at 670 (emphasis added); *accord*, Henderson v. United States, 446 F.2d 557 (5th Cir. 1971).

[13] 395 U.S. at 726, 23 L.Ed.2d at 670; accord, Barnes v. United States, 419 F.2d 753 (D.C. Cir. 1969).

[14] 398 U.S. 319, 26 L.Ed. 262 (1970).

in this case that the due process standard of Pearce was violated. As counsel forthrightly stated in the course of oral argument, "I have never contended that Judge Pugh was vindictive." [15]

As the district court recognized it is possible to conceive of circumstances where a jury might impose a harsher sentence upon retrial motivated by the type of vindictiveness denounced in *Pearce*. But a jury will normally be unaware of the prior trial, much less the sentence. Under the facts and circumstances presented in this case the likelihood of vindictiveness is so remote that we feel the burden must be upon the defendant to show that the jury acted out of vindictiveness in imposing an increased sentence. We have carefully studied the record and briefs in this case and find no evidence of vindictiveness.[16] There is nothing to suggest that the jury which sentenced Chaffin to life imprisonment did so because of a desire to punish him for appealing his case.[17]

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[15] *Id.* at 320, 26 L.Ed. at 264.

[16] In Kansas City v. Henderson, 468 S.W.2d 48 (Mo. Sup. Ct. 1971) the Missouri Supreme Court, in dealing with the principles enunciated in *Pearce* stated:

> Such considerations cannot possibly be applicable in a case wherein the punishment is assessed by the jury at the time it determines guilt at the second trial. It is not permissible for that jury to even be informed that the defendant was convicted previously on the same charge, and necessarily it may not be informed as to what sentence was received at the prior trial. It would constitute reversible error to introduce such testimony before the jury. Furthermore, such a jury in a one-step trial would not have before it evidence of things occurring between the first and second trial or other evidence relative to whether there ought to be greater punishment than that imposed at the first trial. These things would not be competent evidence for a jury determining guilt of the offense charged. Consequently, the jury in the second trial exercises its judgment as to the punishment to assess solely upon the evidence introduced at the second trial and the court's instructions. Necessarily, it does not in any way measure that punishment by what was done at the first trial. The punishment imposed by the jury in the second trial cannot be for the purpose of imposing a heavier sentence and thereby punishing the defendant for having been successful in getting his original conviction set aside.

468 S.W.2d at 52-53.

[17] In his supplemental brief on appeal Chaffin does attempt to show vindictiveness by listing other defendants who have received lesser sentences than he for robbery convictions in the same state court. These statistics are not veri-

We are not unmindful of the fact that the Fourth Circuit in *Levin v. Peyton*[18] had held *Pearce* to apply to jury sentencing. That circuit concluded that the Supreme Court in *Pearce* was concerned "that a defendant be freed of the apprehension of a harsher sentence after retrial," and upon that basis decided that jury sentencing does not provide the requisite freedom. While the *Pearce* court was concerned with the apprehensions of the defendant, we think it limited its concern to fears of a retaliatory motivation. The Fourth Circuit has, in our view, extended *Pearce* beyond the rationale upon which it was decided.

We note in conclusion that the result we now reach is in accord with this court's decision in *Salisbury v. Grimes,*[19] a pre-*Pearce* case. In *Salisbury* the court held that the imposition of a greater sentence by a Georgia jury upon retrial violated no constitutional principles.

> In our view it would be wholly incongruous and without Constitutional foundation, to hold that a state is forever bound by and may not increase a jury imposed sentence but that the defendant may nevertheless shoot for its reduction with a guarantee in advance that the next jury cannot increase the penalty, although acting on the evidence it has heard and entirely free of any knowledge from which it might impose punishment for taking the appeal.[20]

We find no conflict between the *Salisbury* rationale and that set forth in *Pearce.* Various state courts and at least

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fied and even if they were, we think they are of no help to Chaffin. The mere fact of variances in length of sentences awarded separate defendants in unrelated trials is no indication of vindictiveness. *Cf.* Howard v. Fleming, 191 U.S. 126, 48 L.Ed. 121 (1903); Earin v. Beto, —— F.2d —— (5th Cir. 1971) [No. 71-2824, Jan. 3, 1972].

[18] Levine v. Peyton, 444 F.2d 525 (4th Cir. 1971), *cert. denied* 40 U.S.L.W. 3275 (U.S. Dec. 14, 1971); *accord,* Pinkard v. Neil, 311 F. Supp. 711 (M.D. Tenn. 1970).

[19] 406 F.2d 50 (5th Cir. 1969). Due to subsequent developments the case was remanded with instructions to dismiss as moot in an unreported en banc order dated October 8, 1970.

[20] *Id.* at 52.

one federal district court are in accord[21] with our conclusion.

Judgment AFFIRMED.

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[21] Britt v. Tollett, 315 F. Supp. 401 (E.D. Tenn. 1970); State v. Miller, 231 So.2d 260 (Dist. Co. App. Fla. 1970); Salisbury v. Grimes, 223 Ga. 775, 158 S.E.2d 412 (1967); Bruce v. Commonwealth, 465 S.W.2d 60 (Ky. Ct. App. 1971); Kansas City v. Henderson, 468 S.W.2d 48 (Mo. 1971); Branch v. State, 445 S.W.2d 756 (Tex. Crim. App. 1969) (on rehearing).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2016

JAMES CHAFFIN, PETITIONER-APPELLANT,

versus

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY, RESPONDENT-APPELLEE.

D. C. Docket No. CA 14890

*Appeal from the United States District Court for the Northern District of Georgia*

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued As Mandate: MAR. 8, 1972

FEBRUARY 8, 1972

[Filed Feb. 29, 1972. Edward W. Wadsworth, Clerk]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES CHAFFIN, PETITIONER-APPELLANT,

versus

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY, RESPONDENT-APPELLEE.

No. 71-2016

*Appeal from the United States District Court for the Northern District of Georgia*

(February 29, 1972)

ON PETITION FOR REHEARING

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

SUPREME COURT OF THE UNITED STATES
October Term, 194..

JAMES CHAFFIN, PETITIONER,

v.

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY

No. 71-6732

On petition for writ of Certiorari to the United States ..... Court of Appeals for the Fifth ..... Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 16, 1972

☆ U.S. Government Printing Office: 1972—489-597/330